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Citation

Mark Tushnet, Political Power and Judicial Power: Some Observations on Their Relation, 75 Fordham L. Rev. 755 (2006).

Published Version

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2006

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Recommended Citation

Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 Fordham L. Rev. 755 (2006).
Available at: <http://ir.lawnet.fordham.edu/flr/vol75/iss2/15>

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POLITICAL POWER AND JUDICIAL POWER: SOME OBSERVATIONS ON THEIR RELATION

Mark Tushnet*

INTRODUCTION

This Essay summarizes and perhaps extends slightly some important recent work, mostly by political scientists, on the structural relation between the array of political power in a nation's nonjudicial branch or branches and the way in which judicial review is exercised in relatively stable democracies. Robert Dahl's classic article identified one such relation.¹ According to Dahl, "[e]xcept for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance."² What, though, if there is no "dominant" national political alliance? Can anything systematic be said about the courts' role during transitional periods? Recent scholarship suggests that Dahl describes only one part, albeit perhaps a large one, of a more complex picture.

This Essay draws on that scholarship, dealing with constitutional adjudication around the world, to describe three patterns of relationship. Part I describes a form of partisan entrenchment similar to the one Dahl described. Part II describes a more dynamic form of such entrenchment. Part III describes a pattern of consensual delegation of policy-making authority to the courts.³ A brief conclusion suggests that the type of analysis in which I engage in this Essay will produce useful insights into constitutional law and politics if that analysis is extended and elaborated.

Two preliminary comments on method are appropriate. First, sometimes I use terms suggesting that these patterns result from intentional choices by politicians and judges. At times the choices are indeed intentional, but at times they are not. Sometimes the outcomes result from the overall structures of politics and institutions and the incentives they set up for

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1. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

2. *Id.* at 293.

3. I draw the term "partisan entrenchment" from Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001), but give it a somewhat different meaning.

politicians and judges. Second, political and institutional structures and incentives underdetermine behavior, and the patterns I describe will never capture everything about a constitutional court's behavior. Rather, they describe central tendencies that appear when political power is arrayed in specified ways. My discussion may illuminate a fair amount of what constitutional courts do, but there will be corners, perhaps large ones, the understanding of which will require different forms of explanation.

I. THE DEEPLY ENTRENCHED PARTISAN COALITION AND JUDICIAL REVIEW

Dahl described the pattern after a political coalition establishes its dominance. He argued that the U.S. Constitution's provisions for nominating and confirming federal judges implied that as new Justices replaced old ones, the Supreme Court would come to be composed of Justices whose constitutional vision was compatible with that of the dominant coalition.⁴ Norms of appropriate judicial behavior to match the dominant coalition's vision are likely to develop as well, if the coalition's dominance is sustained over a generation or two. The result is that the constitutional court in such a system routinely ratifies central national policies, and takes on the governing coalition, if at all, only with respect to issues at the fringes of the coalition's concerns.

Political scientists describe this pattern from the perspective of elected officials. These officials are able to enact whatever policies they think appropriate because of their sustained political dominance. In the absence of serious electoral challenge, why would they tolerate the existence of an institution that would do what their electoral opponents cannot—that is, displace policies important to the dominant coalition? Elected officials select (and train) constitutional court judges whose constitutional interpretations will not impede the dominant coalition's policies.

The evidence for this pattern comes from various nations. Sweden's constitution has provided for judicial review for many years, but the Swedish Supreme Court has barely exercised its power to invalidate national legislation.⁵ One reason is constitutional text, which authorizes invalidation of national legislation only if the inconsistency between the law and the constitution is "manifest."⁶ Another reason, though, is the long dominance of social democratic parties in the Swedish Parliament.⁷ A

4. For an example of the way in which different selection mechanisms might affect the relation between political and judicial power, see *infra* text accompanying notes 39-41.

5. See Judicial Activism in Comparative Perspective 2 (Kenneth M. Holland ed., 1991) (noting that as of 1991, "the Supreme Court of Sweden has never found a law of the Riksdag to be repugnant to the constitution"); E-mail from Eivind Smith, Professor of Constitutional Law, University of Oslo, to author (Sept. 12, 2006, 03:48 EST) (on file with the Fordham Law Review) (stating that "the [Swedish] courts have barely exercised [its] power to invalidate national legislation on Constitutional Grounds" (internal quotations omitted)).

6. Regeringsformen[RF][Constitution] 11:14 (Swed.), available at http://www.riksdagen.se/templates/R_PageExtended_6328.aspx.

7. It is worth noting that Sweden's membership in the European Union (EU) might induce a greater degree of judicial invalidation, including invalidation of some laws adopted

similar pattern has occurred in Japan. Modeled on the U.S. Constitution, the Japanese constitution of 1947 provided for judicial review, but the Japanese Supreme Court has been quite inactive, to the point where its occasional invalidations of legislative and even administrative policy on constitutional grounds are the subject of great attention.⁸ Here the explanation seems equally straight-forward—the long domination of Japanese politics by the Liberal Democratic Party.

In the United States, Dahl accurately describes the Supreme Court during periods of what Bruce Ackerman calls “normal politics,” which occur after moments of constitutional transformation.⁹ Ackerman’s description of alternating periods of constitutional and normal politics, in turn, helps make sense of the rhythm of judicial review in the United States, with its peaks of activism during transitional periods and its valleys of restraint during periods of normal politics.

And yet, the Dahlian perspective seems somewhat flat and lacking nuance. The reason, I suggest, is that Dahl’s contribution came quite early, and that more recent theoretical developments in the field of American political development provide the opportunity for an elaboration of Dahl’s insight that preserves its core but allows us to see more complex patterns. Karen Orren and Stephen Skowronek have given the label “intercurrence” to the phenomenon that different political orders—or, in the terms I have used, different constitutional orders—can coexist or at least can overlap, with some aspects of an older constitutional order persisting after a new order has come into being.¹⁰ And, importantly, intercurrence means that principles inconsistent with the fundamental principles of a new constitutional order may persist—and so be enforced by the courts—even as the new order settles in.

Consider here the Supreme Court produced by Franklin Roosevelt’s New Deal. As Kevin McMahon has shown, that Court laid the foundation for the

by the Swedish Parliament under the direction of the EU (that is, resulting from Sweden’s compliance with EU “directives”). The reason is that such laws, though nominally resulting from decisions by the Swedish Parliament, are in fact the product of decisions made outside Sweden, and not necessarily by a political coalition similar to that dominant in Sweden itself. For an example, see <http://dsv.su.se/jpalme/society/Ramsbro-HD-domen.html> (last visited Oct. 3, 2006) (providing the Swedish text of a decision of June 12, 2001, partially invalidating as inconsistent with the Swedish constitution parts of the EU data privacy directive).

8. See David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652, 692 n.142 (2005) (citing sources supporting the proposition that “[i]t is consistently observed that judicial review in Japan is extremely deferential in practice”).

9. For Ackerman’s terminology, see, e.g., Bruce Ackerman, *We the People: Transformations* 265 (1998). For a qualification, see *infra* text accompanying notes 18-19 (describing the use of judicial review to clean up local “outliers” whose legislation is inconsistent with the policies of the dominant national coalition).

10. For Orren and Skowronek’s term, see Karen Orren & Stephen Skowronek, *The Search for American Political Development* 108-18 (2004). For my term, see Mark Tushnet, *The New Constitutional Order* 1 (2003) (defining “constitutional order”).

Warren Court's revolution in civil rights and civil liberties.¹¹ Yet, Roosevelt and those who helped him select Supreme Court Justices were largely indifferent to, and some were actively hostile to, expansive interpretations of civil rights and civil liberties. They chose Justices whom they knew were "reliable" on the issues of national power that centrally concerned the Roosevelt Administration. As it happened, nearly everyone who was committed to rejecting the Old Court's vision of limited national power was also a political liberal.¹² And, their liberalism found its grounding in some aspects of the libertarianism that animated the Old Court itself. On issues of race, for example, the New Deal's progressive Justices could invoke *Buchanan v. Warley*, which relied at least in part on property rights ideas to invalidate municipal ordinances requiring residential segregation.¹³ Substantive due process cases like *Meyer v. Nebraska* retained unacknowledged vitality when the New Deal Court began to develop the idea that legislation differentially affecting fundamental rights had to receive extremely careful review.¹⁴ And some Justices approached free speech issues with a libertarian sensibility that drew some of its force from dissents to statist decisions from the Old Court. Recall here one of my preliminary qualifications, that the patterns I describe need not result from intentional choices made by elected officials. That seems clearly true of the New Deal Court's decisions on civil rights and civil liberties. They were a by-product of the conscious choice to place supporters of national power over commerce on the Supreme Court.¹⁵

Finally, it is worth observing that the political scientists' concept of intercurrency fits nicely with Ackerman's argument that the Supreme Court's task after constitutional moments have passed is to synthesize the principles of the new constitutional order with those principles of older orders that retain their vitality.¹⁶

11. See generally Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (2004). I should note that my account differs on some matters of detail from McMahon's, but that my account has been strongly influenced by his.

12. The term Old Court refers to the U.S. Supreme Court before 1937. For this usage, see, e.g., Ackerman, *supra* note 9, at 280-81.

13. 245 U.S. 60 (1917).

14. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

15. For a related discussion, see Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489 [hereinafter Balkin & Levinson, *Processes of Constitutional Change*].

16. For Ackerman's description of the synthetic task, see Bruce Ackerman, *We the People: Foundations* 86-94 (1991). I would qualify this observation only by noting that, at least as elaborated so far, Ackerman's description appears to make permanent the synthetic enterprise, whereas the concept of intercurrency suggests that the synthetic task lasts only as long as the principles of the older constitutional order retain some force in some significant domains.

II. POLITICAL RELIANCE ON JUDICIAL REVIEW

Part I has described one way in which a constitutional court can collaborate with elected officials—by refraining from interpreting the Constitution to interfere with the implementation of those officials' policy agendas. Other forms of collaboration are possible.¹⁷

Consider first a simple possibility, in which there is significant consensus across party lines—that is, between members of the dominant political coalition and members of the minority—on some important constitutional values. Yet, there is some possibility of dissent from that consensus, for example, by outliers who happen to control one or a few local governments. Such departures are bothersome to the dominant coalition because they provide the minority with political opportunities. If the left is in control, for example, defections to the more extreme left might foster defections to the right, bringing the minority into power. Or, the minority might gain political mileage by castigating the dominant coalition for failing to control its members or, more important, for secretly harboring the ambition to advance the defectors' policy notwithstanding the dominant coalition's seeming adherence to the consensus. The dominant coalition might use the courts to discipline—that is, invalidate—these opportunistic defections.¹⁸

The notion of outliers implicates an additional form of using the courts to implement the dominant coalition's policy agenda. Effectively implementing such an agenda is often difficult. In particular, doing so might require reaching rather far down into the daily operations of ordinary public bureaucracies. The dominant coalition has a choice among implementation tools. The courts can be a particularly useful implementation device for dealing with matters of detail that are hard for the national legislature or its own bureaucracies to get a handle on. We could describe the dominant coalition as delegating some aspects of implementation to the courts, or as allocating policy implementation among a number of institutions, one of which is the judiciary.¹⁹

Lucas A. Powe's discussion of the Warren Court provides one prominent example of this sort of delegation or allocation.²⁰ Powe describes

17. I note one theoretical possibility, although I am aware of no good examples of its instantiation. A dominant national coalition might use the courts to discipline—that is, invalidate—opportunistic defections from the coalition's agreements, which might occur when some component of the coalition sees the chance for a short-term electoral gain from defection, and the rest of the coalition fears that the defection will lead to the coalition's collapse and displacement from power.

18. I suspect that an account like that in the text describes a fair amount of the work of the modern German Constitutional Court, although I have not done sufficient research to be confident about that judgment.

19. The dominant coalition could use some of its (relatively limited) legislative time to discipline these outliers, but the courts are an available resource that the coalition can use instead. Presumably, the implicit calculation is that the coalition gains more by freeing up time in the legislature than it loses by imposing these mopping-up operations on the courts, which do lose some time that they might devote to other tasks.

20. Lucas A. Powe, Jr., *The Warren Court and American Politics* (2000).

"history's Warren Court"—that is, the Warren Court at its height from 1962 to 1968, as enforcing the national Democratic policy agenda against two targets. "The geography of constitutional violations [found by the Warren Court] . . . is the South by an overwhelming margin. Then it picks up urban areas of Catholic dominance."²¹

During "history's Warren Court," the South's values—on matters relating to race, religion, and criminal justice—were increasingly out of line with the values held by the central figures in the national Democratic Party. Powe summarizes the Warren Court's work on the Constitution and race: "[T]he legal regime of race was nationalized But the effort was not a national one. It was directed exclusively at the South and was designed to force the South to conform to northern—that is, national—norms."²² *Griswold v. Connecticut*²³ exemplifies legislation in the second target area. By 1965 only Connecticut, Massachusetts, Rhode Island, and New York had statutes on the books making it an offense to use contraceptives.²⁴ Statutory repeals had been thwarted, at least from the perspective of national Democratic elites, by the undue political influence of the Roman Catholic Church. *Griswold* was the national political coalition's way of bringing these states into line. In Powe's words, "[t]he South was an outlier on segregation; the Northeast on contraception; and the Court was tolerating no outliers."²⁵

Mark Graber's important article, *The Nonmajoritarian Difficulty*, identifies another significant form of collaboration between elected politicians and the courts.²⁶ Courts discipline outliers in the service of the dominant national coalition's policy agenda. Graber points out that sometimes the coalition does not have an agenda with respect to specific issues that are, nonetheless, important to the coalition's components. The reason is that the components care about the issue but seek to have it resolved in opposing ways. If the coalition's leaders seek to advance one policy approach to the issue, they will fracture their coalition. From the leaders' point of view, the best solution is to keep the issue out of politics. Sometimes, though, that is impossible. Graber argues that their second-best

21. *Id.* at 493.

22. *Id.* at 490. Powe also observes that "[t]he Court's handful of religion cases paralleled the geography of the obscenity cases. They were either from the South or from the arc running from New England through the Middle Atlantic states where laws already on the books acquired the backing of the local Catholic hierarchies." *Id.* at 492.

23. 381 U.S. 479 (1965).

24. See Powe, *supra* note 20, at 376 (referring to Connecticut and "its backward cousins" in those states).

25. *Id.* at 372. I should note that the national Democratic Party's policy agenda combined electoral considerations, such as retaining the support of African-Americans in the North and perhaps gaining such support from African-Americans in the South, with ideological ones, such as a commitment to a substantive liberalism that emphasized freedom of choice with respect to personal matters and the need to control market choices in the economy.

26. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. in Am. Pol. Dev.* 35 (1993).

strategy might be to get someone else to resolve the issue, and then hope that the resolution will “stick” in a way that allows the electoral coalition to hold together. Delegating the issue to the courts—that is, to judicial elites—might be particularly attractive when political elites believe that they share the views of judicial elites on the issue but are unable to act on those views because their constituents (the “base”) hold opposing views.²⁷

Graber offers two examples. In one, the delegation of the divisive issue to the courts failed, and in the other it was a partial success. The first example is the issue of slavery in the 1850s. The Democratic Party was a rough coalition of Northerners ambivalent at best about slavery and Southerners deeply committed to its continued existence. Issues related to slavery kept appearing on the national political agenda, and each time they did the question of slavery’s constitutionality arose and made achieving solutions to each specific issue more complicated. According to Graber, Democratic Party strategists welcomed the possibility that the Supreme Court might be able to take the slavery issue out of politics. On this view, the communications between members of the Supreme Court and President-elect James Buchanan as the *Dred Scott* case was pending were no accident. The Justices informed Buchanan that they were about to hold the Missouri Compromise unconstitutional on the ground that Congress lacked the power to ban slavery in the western territories, and in his inaugural address Buchanan appealed to the nation to accept the Court’s forthcoming decision. Of course, because that decision declared unconstitutional the central plank in the Republican Party platform, thereby appearing to make the leading opposition party’s program unachievable, the delegation of the issue to the Court may have solved the problems facing the Democratic Party’s leadership in the short run, but only at the cost of tearing the party and the nation apart a few years later.

Graber’s second example is the abortion issue. Here, he argues, both major parties faced internal divisions. The Democratic Party was a coalition that included urban Catholics opposed to abortion and members of the professional middle classes who tended to hold progressive views on the issue. The Republican Party was a coalition that included Northeastern and other cosmopolitan business-oriented conservatives and, since the campaign of Barry Goldwater in 1964, an increasing number of social conservatives. As abortion-rights activists pressed their issue on to the political agenda throughout the country, the strategy of delegating the decision to the courts made sense, Graber argues, to the political leadership of both parties.

This strategy was a partial success. The abortion issue continued to divide the Democratic Party, but not the Republican Party. The reason was that the abortion issue mattered a great deal to both components of the Democratic coalition, but mattered far more to the Republican Party’s conservative base than to its business-oriented component. Further,

27. I place the term “base” in scare-quotes because it is not clear to me that there is any analytic way of fairly singling out one component of a coalition as the coalition’s base.

Republican leaders could hold their coalition together by blaming the courts for their failure to deliver a strong anti-abortion policy to the conservative base. Eventually, of course, the base caught on and insisted on the appointment of judges whom they hoped would sooner rather than later make it possible to make abortion illegal again. And, strikingly, as that strategy took hold, Northeastern Republicans began to rethink their commitment to the party.

Both examples illustrate one drawback to the strategy of delegating divisive issues to the courts. The abortion example as seen from the Republican side shows what can happen when judicial elites take a position compatible with the views of one portion of the dominant coalition but incompatible with the views of the coalition's core or base. The strategy may solve the political problems faced by elected leaders in the short run, but it can only succeed in the long run if those who lose in the courts accept that loss. There are pretty clearly no structural reasons for believing that the losers will do so, and Graber's examples show, at the least, that they have not always done so. The possibility that delegating divisive issues to the courts will not take them off the political agenda therefore implies that the strategy makes sense only for political leaders with a relatively short time-horizon: Such leaders will maintain their power in the short run by delegating the issue to the courts, and they will not be around to worry about the political consequences in the longer run.

This observation about politicians' time-horizons helps frame the final relationship between political power and judicial power that I describe in this Essay.

III. ATTEMPTED PARTISAN ENTRENCHMENT VIA JUDICIAL REVIEW DURING TRANSITIONAL PERIODS

Ran Hirschl's recent work on the establishment of judicial review in stable democracies, and related scholarship, has shown one basic relationship between political power and judicial power.²⁸ The story Hirschl and others tell is this: Consider a political coalition that has been dominant for a reasonably long period but that comes to foresee that it will lose electoral control relatively soon. The leaders of that coalition use the power they still have to entrench in the courts judges who will (a) do what they can to continue to advance the (soon-to-be-displaced) coalition's

28. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) (discussing the adoption of judicial review in four nations in the late twentieth century). For additional studies contributing to the literature on this version of partisan entrenchment, see Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. Legal Stud. 721 (1994) (discussing Japan); Matthew C. Stephenson, *When the Devil Turns . . . : The Political Foundations of Independent Judicial Review*, 32 J. Legal Stud. 59 (2003) (developing a formal model of the process).

policy agenda, and (b) do what they can to obstruct the implementation of the former opposition, now dominant, coalition's policy agenda.

The canonical U.S. example of this form of partisan entrenchment is the Federalists' attempt to pack the federal courts after they decisively lost the national elections of 1800 but, because of a serious flaw in constitutional design, retained office for several months.²⁹ The Federalist Congress and President John Adams attempted to pack the federal courts by reorganizing them in a way that created new positions filled by the Federalist "midnight judges." That particular strategy failed when the new Congress repealed the reorganizing statute and the Supreme Court let the repeal take effect. But, as we all know, the Federalists had another arrow in their quiver: the appointment of John Marshall to serve as Chief Justice. Marshall's job, it seemed, was to entrench Federalist constitutional theories and interpretations in the Supreme Court, thereby impeding the implementation of Jeffersonian policies.

And, as again we all know, even that strategy did not work terribly well. True, Marshall's Court confirmed the widespread understanding that the Supreme Court could hold national statutes unconstitutional,³⁰ but he and his Court did not use that power to block any important Jeffersonian programs. Still, as the second Justice John Marshall wrote, "the value of a sword of Damocles is that it hangs [here, over the head of the legislature,] not that it drops," that is, that the courts threaten invalidation even if their threat never needs to be carried out.³¹ And Marshall did use the judicial power to harass Jefferson's administration, particularly in connection with the prosecution of Aaron Burr.³² But, in the end, the most that can be said for the Federalist attempt at partisan entrenchment is that it led to the adoption of doctrines of national power—a moderate nationalist constitutionalism—that authorized the national government to do a lot of what the Federalists hoped it would do. A robust Jeffersonian constitutionalism might have looked quite different. Yet, it is not clear that even Jeffersonian judges would have articulated a constitutionalism that severely limited the possibilities for national power. And why would they want to? As long as Jeffersonians controlled the political branches, vigorous exercises of national power were likely to be rare. When they occurred they would be in the service of Jeffersonian goals, so Jeffersonians would hardly be likely to desire to find their own policies unconstitutional.³³

29. For a recent detailed account, see Bruce A. Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (2005).

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31. *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

32. For a discussion of John Marshall's role in the treason trial of Aaron Burr, see R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 179-202 (2001).

33. See also Balkin & Levinson, *Processes of Constitutional Change*, *supra* note 15 (describing a similar phenomenon on recent constitutional developments).

Several features of this version of partisan entrenchment should be noted. First, the U.S. example, while dramatic, may be a bit misleading because it involves a case in which judges were put into place as part of the strategy of partisan entrenchment. More usually, though, the coalition about to lose power can rely on the judges already in position, who were appointed when that coalition's dominance was unchallenged and seemingly permanent, to carry the coalition's policies forward.

Second, the Jeffersonian response to partisan entrenchment—eliminating the newly created judgeships and attempting to remove one of the most partisan of the entrenched judges—demonstrates that the new coalition in power has resources with which to combat an attempted partisan entrenchment. Indeed, the existence of such resources suggests that this version of partisan entrenchment has inherent limits. The new coalition's ability to respond or retaliate may be constrained a bit by "rule of law" ideas, but only a bit, particularly to the extent that its leaders and supporters interpret what has gone before as an attempt at partisan entrenchment.³⁴ The judges who are the vehicles for partisan entrenchment therefore must be careful about what they do, tempering the most aggressive actions on behalf of the displaced coalition so that they can fight another day.³⁵

But, of course, that day might never come. Ackerman's account, and indeed the general structure of this version of partisan entrenchment, identifies a final important feature of the story, related to the second. If the formerly dominant coalition loses power for a long time, this form of partisan entrenchment cannot succeed permanently. Eventually the former opposition will be in a position to place its own supporters in the courts. So, as indeed Ackerman's account of the Marshall Court suggests, the best the displaced coalition's leaders can hope for is that their partisans in the courts will be able to delay and smooth out the transition between one constitutional order and the next.³⁶ Except for this: Political leaders who foresee their defeat in the next election may believe that they will return to office soon. If they are correct, judicial delay and obstructionism can make it possible for those political leaders to carry on as before once they come back into power. From the leaders' point of view, then, partisan entrenchment is an attractive strategy. It might lead them to win in the long run (if they return to power), and it allows them to lose gracefully (if they do not).

When they foresee their loss of power and so consider the strategy of partisan entrenchment in the courts, political leaders cannot know whether

34. I suspect that the unfolding story of judicial review in Israel, which is one of Hirschl's cases, will end up illustrating these limits and constraints.

35. This has become the standard account of the Marshall Court's response to the Jeffersonian counterattack: asserting the power of judicial review in *Marbury* on a substantive issue no one cared about, and giving the repeal of the 1801 Judiciary Act a constitutional pass in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

36. I take this to be one aspect of Ackerman's account of the synthetic task courts must perform.

their loss of power will be temporary or permanent. That uncertainty might provoke some thought about the next step in executing the strategy. What should the now-entrenched judges do? One might think that they ought to obstruct the newly empowered coalition because, after all, that is what those who appointed them had in mind. Yet, the possibility that political coalitions will cycle into and out of power suggests that the strategy of partisan entrenchment followed by obstructionism is unstable: Your judges obstruct their program; when they anticipate losing power, they appoint their own judges; those judges obstruct your program; and no one does well at all.

Consider, then, another possibility. Of course, once normal politics takes hold, the courts will collaborate with the dominant coalition until the next transition looms. At that point the story becomes quite interesting. The tit-for-tat strategy I have just described has its drawbacks. The U.S. experience with transitions generated an alternative strategy, albeit one far more developed in theory than in practice. This is the theory generally labeled "judicial restraint." Basically it is a theory of bi- or multilateral disarmament. The political leadership of a currently dominant coalition says to its opponents, "We won't appoint judges who will obstruct your policy agenda if you manage to take control, if you promise not to appoint judges who will obstruct our political agenda if we come back into power."

The attractiveness of this strategy depends in part, as already suggested, on political leaders' assessment of the probability that they will be displaced relatively soon, and in part on the mechanisms for judicial selection. Consider first a system in which the dominant national coalition has, for all practical purposes, unfettered choice with respect to judicial selection.³⁷ In such a system, the problems with the strategy of mutual disarmament are obvious.³⁸ First, it requires that political leaders have time-horizons that extend not only through the electoral cycle that might throw them out of power but also into the one that might bring them back into power. Leaders with short time-horizons might anticipate cycling into and out of power quickly and often, but to do so they have to regard their immediate successes as possibly temporary. My sense is that political leaders are typically more optimistic than that.

Second, it is entirely unclear how the mutual disarmament deal could be enforced. Of course those now in power can comply with their promise, but what can those currently out of power do to demonstrate that they really will honor their promises once they take office? Third, and finally, it is not clear that at any point it makes sense for political leaders to support mutual disarmament. Not during periods of normal politics, because the prospect

37. Roughly, this corresponds to a majority-vote selection rule, and to the situation in the United States, subject to a minor qualification about the possibility that minority senators may credibly threaten to filibuster a nominee.

38. The difficulties described in the text may account for the fact that consistent commitments to judicial restraint have been so hard to come by in the history of the U.S. Supreme Court.

of electoral displacement then seems quite remote. And not when the prospect of transition is a real one, because the immediate gains from appointing judicial allies are likely to outweigh the remote and speculative benefits that will accrue only when the next transition occurs.

Contrast this with a selection rule giving members outside the dominant political coalition veto power over judicial selection. The commitment to judicial restraint can then be enforced by exercising the veto.³⁹ The German selection rule, which (simplifying) requires a two-thirds vote to confirm an appointment,⁴⁰ might have this effect.⁴¹

The analogy to weapons-control agreements suggests a final possibility. During the Cold War good behavior with respect to nuclear weapons was induced by the policy of Mutual Assured Destruction (MAD): The United States and the Soviet Union both knew that if either misbehaved, the consequences would be both immediate and disastrous. So, perhaps, the best strategy for opposing political parties is to commit themselves to using the courts as vigorously as they possibly can, with the threat that doing so would provoke a constitutional crisis. The difference between MAD in the arms control and judicial review contexts is this: MAD would occur almost immediately upon misbehavior, whereas the possibility of a constitutional crisis that seriously damages both sides seems difficult to imagine. The analogy might be saved, a bit, by the observation that judicial appointments tend to be spread out over a reasonably extended period. The contending parties will frequently have allies on the courts. As a result, each side might be in a position to provoke a constitutional crisis. That in itself might induce a degree of restraint that could be described as an equilibrium.

Jack Balkin and Sanford Levinson have supplemented the preceding account of partisan entrenchment by identifying another version. The account I have sketched so far has political leaders entrenching their supporters in the courts. Upset by *Bush v. Gore*,⁴² Balkin and Levinson describe the obverse: judges entrenching their political allies in the electoral branches.⁴³ Here the judges foresee the displacement of those allies, and use their power to keep them in office.

I suspect that many readers will find such judicial action normatively troubling. Consider, then, this defense: The judges believe—perhaps correctly—that the displacement of their electoral allies is an aberrational

39. This proposition holds at least to the extent that the judges who are chosen adhere to a commitment to judicial restraint that they demonstrate prior to appointment.

40. For the German selection rule, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21-22 (2d ed. 1997).

41. *But see supra* text accompanying note 28 (suggesting that the German Constitutional Court has engaged in relatively vigorous judicial review with respect to issues as to which there is substantial consensus across party lines).

42. 531 U.S. 98 (2000).

43. Hirschl describes a number of other interventions by constitutional courts in the selection of electoral officials, although he does not spell out the “partisan entrenchment” account of such interventions (which may not be accurate with respect to some of those interventions). Hirschl, *supra* note 28, at 169-210.

departure from the “normal” course of politics. They believe, again perhaps correctly, that they are operating within a period of normal politics, and yet someone is about to take office who would attempt to transform those politics, and so the constitutional order, without adequate support from the electorate. The attempt to begin a constitutional revolution that the judges see on the horizon lacks sufficient justification, and, from the judges’ point of view, is likely to fail, but only at some real cost to stable democracy. Ensuring that normal politics continues is not obviously troubling in normative terms.⁴⁴

Bush v. Gore suggests yet another version of partisan entrenchment driven by the courts. Elsewhere I have argued that the Rehnquist Court brought constitutional law to the threshold of a constitutional transformation, but did not cross that threshold.⁴⁵ The transformation was the one sought, again unsuccessfully, by—successively—Barry Goldwater, Ronald Reagan, and Newt Gingrich. Suppose a majority of the Supreme Court’s members believed that the increasing attractiveness of the Goldwater-Reagan-Gingrich program to the American people foreshadowed a successful constitutional transformation that would be thwarted once again by the presidency of Al Gore but accomplished by the presidency of George W. Bush. Here partisan entrenchment gives a shove to a constitutional transformation that is already in train, but obstructed by chance political events.⁴⁶

One possible outcome suggested by Balkin and Levinson is that the strategy of partisan entrenchment works for quite a long time. The courts forestall the displacement of their political allies; their allies thus retain power in the elected branches; the elected branches appoint new judges who sustain the dominant coalition’s policy agenda, mop up outliers, and the like. Balkin and Levinson describe this possibility in alarmist tones. Yet, one might wonder, how exactly is it different, other than in its inception, from the long-term dominance of a national political coalition of the sort that characterized Sweden, Japan, and, for that matter, the New Deal constitutional order? Perhaps the difficulty is that partisan entrenchment induced at the outset by judicial action can be sustained only by repeated judicial interventions that in some sense thwart the outcomes that the people would otherwise reach without judicial intervention. I doubt that we have enough evidence to be confident about that proposition.

44. Given my invocation of *Bush v. Gore*, I should note (a) that I am not contending that the conditions I have described were actually satisfied in 2000, and (b) that the normative defense of this form of partisan entrenchment crucially depends on the accuracy of the judges’ beliefs about what the new occupants of electoral power are about to do.

45. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005).

46. I have toyed with the idea that this form of partisan entrenchment amounts to the courts disciplining temporal outliers in a manner parallel to the way in which courts during periods of normal politics discipline geographic outliers, but I have not been able to formulate the idea clearly enough to commit myself to it.

CONCLUSION

This Essay has indicated some of the ways in which arrays of political power can be connected to the way constitutional courts exercise—or refrain from exercising—the power of judicial review. The survey is plainly incomplete. The most obvious omission is this: Suppose a nation experiences a long period in which there is no dominant national political coalition. Formal models of judicial behavior indicate that judges in such periods have complete freedom to enforce whatever constitutional visions they happen to hold. The reason is that, extraordinary circumstances aside,⁴⁷ the judges' constitutional vision will be shared by enough elected politicians to block any political response to the judges' actions.⁴⁸ Yet, it is unclear to me that this formal result actually describes reality.⁴⁹

In addition to qualifications within each of the patterns I have described, then, there clearly is more work to be done on the question, How do arrays of political power relate to the exercise of judicial review? I hope, though, that this Essay has indicated why attempting to answer that question is likely to produce insight into the way in which constitutional law is made.

47. "Extraordinary circumstances" refer to situations where the judges' constitutional visions are far outside the range of those held by a significant number of elected political actors.

48. See Tushnet, *supra* note 10, at 33 (sketching the argument).

49. Tushnet, *supra* note 45 (arguing, with examples from across the domain of constitutional law, that the formal model does not describe the Rehnquist Court's behavior).